In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1533

MANUEL J. BELLO AND GEORGE PERRON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1972. On April 12, 1972, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including May 22, 1972. The petition was filed on May 24, 1972, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

471-266—72

QUESTIONS PRESENTED

1. Whether 26 U.S.C. 5301(c) imposes strict criminal liability for the possession of altered liquor.

2. Whether the trial judge prejudiced petitioners by amending the indictment to include the word "knowingly" and instructing the jury that it could convict petitioners only if it found that they had knowingly possessed altered liquor.

3. Whether, in the circumstances of this case, the search and seizure of the liquor bottles violated petitioner's Fourth Amendment rights.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted for possession of altered liquor in violation of 26 U.S.C. 5301(c)(4). Petitioner Perron received a one-year suspended sentence and was placed on two years' probation; petitioner Bello was sentenced to imprisonment for a term of six months. Each was fined $1,000. After first reversing the convictions (Pet. App. B), the court of appeals granted the government's petition for rehearing, vacated its earlier judgment, and affirmed (Pet. App. A).

On February 25, 1970, federal agents entered the Celebrity Lounge in Lowell, Massachusetts, identified themselves to a barmaid and told her that the purpose of their visit was to examine the liquor to determine if it had been altered in violation of law. The agents then began testing liquor bottles which were located behind the bar. After they had been in the bar for

approximately one hour, petitioner Perron arrived. The agents again identified themselves and explained the purpose of their visit. Perron did not object to the testing and while the tests were being conducted he went about his business in the bar.

Perron was the owner and manager of the bar, which is incorporated under the name of Wedgewood, Inc. Bello, who was not present at any time during the examination and seizure of the bottles, was an employee with some managerial duties. Perron and Bello were the only persons with keys to the liquor storeroom and they replenished the liquor at the bar as it became depleted (Vol. I, 1–31, 36).[1]

ARGUMENT

1. The court of appeals held that Section 5301(c) "does not impose a scienter requirement, but imposes strict liability" for the possession of altered liquor (Pet. App. 14). It further held that petitioners were not relieved of strict liability by the provisions of 26 U.S.C. 5606, which impose liability for a violation of Section 5301 on "any officer, director, or agent of any corporation who knowingly participates in such violation."[2] These holdings were correct.

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[1] Volumes I and II are the transcripts of trial. The volumes are not paginated consecutively; each volume begins with page 1.

[2] Section 5606 provides: "Whoever violates any provision of section 5301 * * * and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be fined not more than $1,000, or imprisioned not more than 1 year, or both, for each such offense."

In enacting the statutory provisions involved in this case, Congress intended to impose strict liability for the possession of altered liquor. See S. Rep. No. 2090, 85th Cong., 2d Sess., 172, 190, relating to the Excise Tax Technical Changes Act of 1958.[3] That Congress may impose such strict liability is clear from this Court's recognition that Congress has broad power to regulate the liquor industry. *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 76; *United States* v. *Biswell,* No. 71–81, slip op. p. 3, decided May 15, 1972; see also *Stilinovic* v. *United States,* 336 F.2d 862, 864 (C.A. 8).

The provisions of Section 5606 do not require that the government charge and prove that petitioners' violation of Section 5301 was knowing. *United States* v. *Wasik,* 230 F. Supp. 280, 281–282 (W.D. Pa.). As the court below pointed out (Pet. App. 14):

> The statute [Section 5606] specifically does not relieve one [of liability] merely because, in selling or offering to sell, he happens to be an "agent or employee" of the owner. The apparent purpose of * * * § 5606 * * * is to provide that persons who are corporate officers, directors, or agents and who do not themselves sell or offer for sale but aid and abet a corporation that does, may not be punished if they lack scienter. However, we are not concerned here with the scope of that provision because the individual defendants were charged directly as

[3] This 1958 amendment reduced the Section 5301 offense from a felony to a misdemeanor and eliminated the element of willfulness.

> "persons who sell and offer for sale distilled spirits."[4]

The indictment's reference to petitioners as agents of the corporation was merely descriptive and did not change the nature of their liability.

2. Petitioners contend that the trial court improperly amended the indictment by inserting the word "knowingly" in front of the word "possess". The court made the oral amendment solely to accommodate petitioners, who claimed in their motion for acquittal that knowing possession was an element of the offense with which they were charged (Vol. I, 101). The court went on to instruct the jury that:

> [i]f either one or both of these defendants had no knowledge at all as to whether or not this liquor was altered, you could not find them guilty under the charges laid in this indictment [Vol. II, 10].

(See also Vol. II, 6.) Petitioners did not object to the court's instructions, even though the court expressly gave them an opportunity to do so (Vol. II, 13–14).

Neither the insertion of the word "knowingly" in the indictment nor the subsequent instruction to the

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[4] The indictment reads in pertinent part: "That on or about February 25, 1970, at Lowell in the District of Massachusetts, WEDGEWOOD, INC., a Massachusetts corporation doing business as Celebrity Lounge, and GEORGE A. PERRON and MANUEL J. BELLO, agents of said corporation, the defendants herein, being persons who sell and offer for sale distilled spirits, did possess ten (10) liquor bottles, more or less, the original contents of which had been altered or increased * * *."

jury prejudiced petitioners. As the court below correctly pointed out, "the trial court merely gave the defendants an extra bonus of which they cannot complain" (Pet. App. 15 n. 6). The action of the trial court in this case is not comparable to the situations in *Stirone* v. *United States*, 361 U.S. 212, and *Ex parte Bain*, 121 U.S. 1, where it was held that a defendant cannot be tried on charges that are not made in the indictment.

3. Relying on *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, petitioners maintain that their Fourth Amendment rights were violated since they were not given an opportunity to refuse to allow the seizure and incur the statutory penalty under 26 U.S.C. 7342. This case, however, is unlike *Colonnade* where the agents were refused entry and then broke a locked door. Neither petitioner nor the barmaid on duty refused to allow the bottles to be tested and the agents used no force in seizing them. Cf. *United States* v. *Biswell*, *supra*. Perron's contention that the seizure was almost finished when he arrived, thus eliminating any chance he had to object, is not supported by the facts. The evidence clearly establishes, as the court of appeals noted, that the testing was still in progress when he arrived and that he made no objection. In these circumstances, the search and seizure were reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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